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No. 00-0263

In the Supreme Court of the United States

NELL NEINAST, INDIVIDUALLY,
Petitioner,

v.

STATE OF TEXAS, ET AL.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant
Attorney General

JEFFREY S. BOYD
Deputy Attorney General
for Litigation

GREGORY S. COLEMAN
Solicitor General
Counsel of Record

S. KYLE DUNCAN
Assistant Solicitor General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1824

ATTORNEYS FOR RESPONDENTS

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RESPONDENT'S BRIEF IN OPPOSITION

THE COURT SHOULD HOLD OR DENY THE PETITION

Petitioner correctly identifies a conflict between the Ninth Circuit, which upheld §35.130(f) against Eleventh Amendment challenge, and the Fourth and Fifth Circuits, which have both held to the contrary. *Compare Dare v. California*, 191 F.3d 1167 (CA9 1999), *with Neinast v. Texas*, 217 F.3d 275 (CA5 2000), *and Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (CA4 1999). Petitions are now pending in all three cases.[1]

Petitioner also correctly notes that "[s]omebody is wrong," Pet. at 11, but it is not the Fifth Circuit. Rather, it was the

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1. *See Dare, petition for cert. filed*, 68 U.S.L.W. 3566 (U.S. Feb. 24, 2000) (No. 99-1417); *Brown, petition for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424).

Ninth Circuit's gross misapplication of the *Chevron*[2] doctrine in *Dare* that created the split. The congruence-and-proportionality evaluation conducted by the Fourth and Fifth Circuits correctly presupposes that the regulation is not inherently arbitrary or capricious under *Chevron* and that, but for its inability to satisfy the congruence-and-proportionality test, it would otherwise have the same force and effect as a legislative enactment. In other words, the Fourth and Fifth Circuits treated the regulation as if it were a statute and then determined whether Congress could have constitutionally applied that statute against the states' Eleventh Amendment immunity.

The Ninth Circuit's analysis, on the other hand, would never even examine the constitutionality of the regulation. Instead, it would generally determine only whether the challenged regulation is basically consistent with the statutory purpose under *Chevron* and would go no further. *Dare*'s erroneous application of the *Chevron* test in these circumstances produces absurd results. For instance, inherent in the Ninth Circuit's analysis is the supposition that the Department of Justice can constitutionally promulgate *as a regulation* what Congress lacks power to enact *as a law*. The Ninth Circuit's *Chevron*-based analysis is unsuitable for evaluating an Eleventh Amendment challenge precisely because it measures only compatibility with congressional intent and not whether that intent is constitutionally permissible.

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2. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

The petition for writ of certiorari in this case may appropriately be held pending the Court's resolution of *University of Alabama Board of Trustees v. Garrett*, No. 99-1240. If the Court rules in *Garrett* that Congress lacked authority to abrogate the states' Eleventh Amendment immunity under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, then the regulations promulgated pursuant to the ADA also lack abrogating power, and it will be unnecessary for the Court to resolve the more limited question presented in this case.

Alternatively, the Court may properly deny the petition even if Court upholds the ADA against Eleventh Amendment challenge. The Fifth Circuit decided this case having previously determined that the ADA validly abrogated the states' Eleventh Amendment immunity. *Coolbaugh v. Louisiana*, 136 F.3d 430 (CA5 1998). Against that backdrop, the Fifth Circuit correctly held that the regulation at issue in this case, 28 C.F.R. §35.130(f), cannot withstand Eleventh Amendment scrutiny because the regulation does not satisfy the congruence-and-proportionality test. Ultimately, then, the proper result in this case does not depend on the Court's resolution of *Garrett* and, although the Court may legitimately hold the petition for *Garrett*, it certainly is not necessary to do so.

CONCLUSION

For these reasons, the Court should hold the petition pending resolution of *Garrett* or, alternatively, should deny the petition.

Respectfully submitted,

John Cornyn
Attorney General of Texas

Andy Taylor
First Assistant Attorney General

Gregory S. Coleman
Solicitor General
Counsel of Record

S. Kyle Duncan
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR RESPONDENTS